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Supreme Court, U.S.

APR 4 - 2003

No. 02-575

In The Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARK KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT BY MEMBERS OF THE UNITED STATES CONGRESS, REPRESENTATIVES DENNIS J. KUCINICH, BERNARD SANDERS, CORRINE BROWN, AND BOB FILNER

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INTEREST OF *AMICUS CURIAE*

This brief is filed by members of the United States Congress who are deeply concerned about the potential for the Court's decision in this case to endanger federal and state consumer protection laws.* This case poses a crucial issue: May a company intentionally make false factual statements to consumers in an effort to increase product sales? If Nike prevails in its arguments, companies will feel emboldened to lie to consumers about a vast array of issues, undermining laws that Congress and state legislatures have enacted to protect the integrity of the marketplace.

This brief is filed by four members of the United States House of Representatives who have long been involved in ensuring protection of consumers in the United States: Dennis J. Kucinich, Representative from the 10th Congressional District in Ohio; Bernard Sanders, Representative at large from Vermont; Corrine Brown, Representative from the 3rd Congressional District in Florida; and Representative Bob Filner, Representative from the 51st Congressional District in California.

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* Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief, in whole or in part, and that no person, other than *Amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk of this Court.

INTRODUCTION

May a company selling tuna fish tell consumers – in advertisements, letters to environmental groups, and elsewhere – that its tuna is caught in a dolphin-safe manner, when it knows that its nets regularly capture and kill dolphins? May a cosmetics company tell consumers – through advertisements, letters to department stores, and otherwise – that it does not test its products on animals, even though it knows that this is untrue and that it regularly uses animal testing in a way that many of its customers would find repugnant? May an agricultural company tell consumers that its products are organic, when it knows that this is false and that it uses pesticides and herbicides? May a manufacturer represent that its products were "made in the United States" or produced with union labor, when it knows those statements are untrue?

The issue in this case is whether the First Amendment protects a company's making false factual statements about its products, likely to matter greatly to some consumers in their purchasing decisions, in an effort to increase sales. That is exactly what occurred here. Nike wrote letters to current and prospective customers – college and university administrators and athletic directors – making false factual assertions about its products for the purpose of continuing and increasing its sales. Nike made similar assertions in newspapers, including in paid advertisements, as part of a public relations campaign designed to bolster sales among those consumers who care about the conditions under which Nike products are made. The question in this case is whether a state can constitutionally prohibit such false speech.

The position taken by Nike and its *amici* fails to recognize that consumers may care more about the conditions under which goods are produced – whether the tuna is caught in a dolphin-safe manner, whether cosmetics are tested in a "cruelty-free" way, whether the produce is organic, whether the shoe company produces its products in "sweatshops" with inadequate wages and working conditions – than the price, ingredients, or caloric content. *Amicus curiae*, members of the Congress of the United States, submit this brief because of concern that if Nike's position is accepted, false advertising and consumer protection laws of the United States and the 50 states will be seriously undermined.

ARGUMENT

I. FACTUAL STATEMENTS BY A MANUFACTURER TO CONSUMERS ABOUT ITS PRODUCTS, WITH THE OBJECTIVE OF INCREASING SALES, ARE COMMERCIAL SPEECH

A. The Distinction Between Commercial And Non-Commercial Speech Is Important And Necessary Because The Marketplace Of Ideas Will Not Protect Consumers From The Harms Of False Statements

This Court has consistently and unequivocally held that commercial speech is a distinct category of expression which is not afforded the same First Amendment protection as noncommercial speech. In *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980), this Court "recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to

government regulation, and other varieties of speech." The Court thus expressly declared that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63 (citation omitted).

Commercial speech must be regarded as a distinct category of expression, this Court has held, for three reasons. First, "the truth of commercial speech . . . may be more easily verifiable by its disseminator" because the speaker provides "information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Virginia State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). Second, commercial speech is less easily chilled because commercial speakers have an economic incentive to speak which counteracts any chilling effect that might occur from regulation. *Id.* Third, "the interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 n.21 (1993). False commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations. As Justice Stevens observed: "The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

All of these concerns are strongly implicated in this case. First, Nike is in the best position to know about the

conditions under which its products are manufactured. Nike makes much of the difficulty of overseeing its far-flung network of contractors around the globe. Pet. Br. at 40. But as compared to consumers, it still has far better access to the evidence concerning the working conditions in places where its products are made. Moreover, surely the distinction between commercial and noncommercial speech cannot rest on the size or the subcontracting practices of a seller of products. If Nike were to lie to its customers about the quality of its shoes or materials from which they are made, it should enjoy no greater constitutional protection from a false advertising suit than a small company. Because California's Unfair Competition Law and False Advertising Law do not impose strict liability,[1] the appropriate way to deal with the truth of Nike's assertions is in a defense, not by granting it blanket constitutional protection.

Second, Nike's strong economic incentive to maintain and expand sales of its products, even in the face of anti-sweatshop criticism, will ensure that it will continue speaking out about its labor practices. Nike argues that the prospect of liability chills the company's speech. Pet. Br. at 38-39. But *nothing* in the record of this case supports this factual assertion. Nike asserts that it has

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[1] As discussed below, there is no basis for Nike's claim, Pet. Br. at 43, that the California unfair competition law, Cal. Bus. & Prof. Code §17200 *et seq.*, creates strict liability. The California Supreme Court did not so hold and, in fact, did not discuss the question of scienter because Nike did not raise the issue below. Moreover, Kasky's complaint is not based on a theory of strict liability, but instead alleges that Nike's representations "are intentionally and/or recklessly misleading and deceptive and/or were negligently made." Complaint ¶30.

refrained from some speech, but there is no evidence of this in the record and no court has made findings about this. Respondent had no opportunity to do discovery concerning whether Nike's allegations are true. In fact, this Court long has noted that commercial speech is unlikely to be chilled. In words that seem directly responsive to Nike's contention, this Court has observed: "Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

Third, California's law exists to protect consumers from exactly the harms alleged in Kasky's complaint: a company intentionally and recklessly making false statements out of a desire to increase its sales among consumers who care about the conditions under which the goods are produced.

B. Nike's Statements To Consumers About Its Products Are Commercial Speech

1. Under the governing *Bolger* test, Nike's speech is commercial speech

Nike contends that commercial speech is speech that does "no more than propose a commercial transaction" and that is "related solely to the economic interests of the speaker and its audience." Pet. Br. at 22. Nike's proposed approach would substantially narrow the current definition of commercial speech. It would jeopardize federal and state deceptive practices and false advertising laws by allowing companies to make intentionally false factual statements about their products with the goal of increasing sales.

Contrary to Petitioner's arguments, this Court has identified three characteristics that distinguish commercial from noncommercial speech: (1) whether the communication is an advertisement; (2) whether it concerns a product; and (3) whether the speaker has an economic motivation. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). In addition, this Court has explicitly held that the fact that the speech concerns public issues is not sufficient to take it out of the realm of commercial speech for to do so would enable a company "to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68 (citation omitted).

All three elements of the *Bolger* test are met here. First, many of Nike's statements which formed the basis for Kasky's complaint were in the form of paid advertisements. Nike "took out full-page advertisements in major U.S. newspapers (*New York Times*, *Washington Post*, *U.S.A. Today*, *San Francisco Chronicle*)." Compl. ¶56. The rest of Nike's statements, although not in the form of paid advertisements, were part of a public relations campaign designed to sell products.[2] Nike was not opining on the desirability of sweatshops as a form of economic development in Southeast Asia, or even generally on whether its practices were good or bad for its workers or the countries in which they live. Rather, it made factual statements

[2] As discussed below, the form of the communication should not be determinative of whether it is commercial speech. If Nike sent letters to university presidents and athletic directors inaccurately describing the price of its products or falsely describing their quality, there would be no dispute as to whether those letters constituted commercial speech, even though not in the traditional form of a paid advertisement.

about its practices to actual and prospective consumers for the purpose of selling Nike's products.

The second element of the *Bolger* test is thus likewise met: the statements were about its products and how they were produced. Nike's statements were not about general working conditions in the apparel industry; the statements were specifically about the conditions under which Nike products are made.

Third, Nike indisputably had an economic motivation. Nike made the factual statements about its labor practices with the objective of persuading consumers to buy its products. College presidents and athletic directors are no doubt an important part of Nike's business. Letters to them, and paid advertisements in newspapers, stating that the products were produced under safe and lawful conditions, were not about debating globalization; they plainly were aimed to ensure continued sales.

2. Nike's statements were not mere expressions of opinion on matters of public concern; they were factual statements intended to sell products

As this Court powerfully observed: "Under the First Amendment there is no such thing as a false idea. However pernicious an idea may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value in false statements of fact.*" *Gertz v. Welch,* 418 U.S. 323, 339-40 (1974) (emphasis added). Nike's statements at issue in this case were not expressions of opinion about the desirability of using sweatshops or of globalization. Rather, the entire focus of Kasky's complaint is on

the false *factual* statements made by Nike in an effort to increase sales of is products. Nike's speech was not political speech intended to influence public policy; it was commercial speech intended to influence consumers' decisions.

Nike was not speaking generally about labor practices in Southeast Asia, or about the effect of globalization on Third World economic development. As the California Supreme Court recognized, if Nike's ads and letters defended globalization generally, or argued that its practices were beneficial to the workers in Asia, its speech would be protected. Thus, Nike is wrong to state that California law prohibits it from speaking out "on nearly *every* public issue – from a company's diversity policy to its community relations efforts to its political activities." (Pet. Br. at 27). It can offer its positions on public issues freely. But Nike's speech was not a general opinion about an issue of public interest; it was speaking about the specific practices under which its *own products* are made.

All agree that when it comes to commercial speech "it is the interest of the listener that is paramount, rather than that of the speaker." ACLU Br. at 7. Consumers have a variety of concerns when they buy products, and concerns about the conditions under which products are made are entitled to no less protection than concerns about price. Nike dismisses some consumer concerns as mere "moral judgments that only indirectly affect consumer behavior" (Pet. Br. at 19) or that "affect[] purchasing choices only secondarily, if at all." (Pet Br. at 36). It asserts that those concerns bear "only a tangential relation to commercial transactions" (Pet. Br. at 26). The ACLU labels the concerns as merely "political," though it concedes that such concerns may indeed affect consumer behavior

(ACLU Br. at 4), and would limit false advertising laws to statements about price, safety, quality, or the "essential purpose or function" of a product (ACLU Br. at 13; Pet Br. at 35.) Nike and the ACLU are wrong as a matter of fact and as a matter of First Amendment law.

As the Solicitor General notes, the concerns of consumers cannot be so easily dismissed. (U.S. Br. at 35-36). For instance, Jewish consumers who observe kosher dietary laws may care more about the conditions under which food products are made (i.e., under rabbinic supervision, or not involving work on Saturdays) than about price. Their "moral" concerns about products likely have a greater and more direct impact on their buying than so-called "economic" concerns. Yet, false assertions about whether a product is kosher – whether on the product label, in paid advertising, in letters to consumers, or even in newspapers – would, under Nike's test, be beyond the reach of state false advertising laws. Similarly, false assertions by a company about whether its products are produced without pesticides or in other environmentally sustainable methods would be beyond regulation, even though many consumers prioritize whether a product is organic over its price. Many consumers would pay more for tuna caught in a dolphin-safe manner, or for cosmetics produced without animal testing, or for goods made in the United States, or for sneakers made in humane working conditions. Nike and its *amici* are wrong in assuming that these concerns are less important to consumers than other aspects of a product and its price.

The efforts of Nike and its *amicus*, the ACLU, to distinguish statements about price, safety, or "the essential functions" of a product are entirely subjective. Who is to say who decides what are the "essential" aspects of a

product? For some, dolphin-safe tuna may be more important than whether tuna is packed in water or oil. If an auto manufacturer publishes false statements about the injuries caused by its products to those in the car, is that entitled to less or more protection than statements about the injuries the product causes to others involved in the crash or to injuries caused to workers who manufacture them? Why should consumer concerns about the safety of products only to the consumer receive legal protection denied to those concerned about safety of products to others, to the environment, or to workers?

Nor can Nike justify the distinction by saying that harms to consumers concerned about anything other than price, quality, or safety are non-"commercial" and thus not within the legitimate scope of government regulation of commerce. (Pet. Br. at 35). Consumers who are misled about which companies to patronize suffer a commercial harm within the meaning of this Court's precedents. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 499 (1996) (plurality opinion) (interest of the government in protecting consumers in their spending decisions). Their motives for buying or eschewing products are irrelevant; false factual statements that might influence their buying are commercial harms, and they are well within the power of states to regulate.

Nothing but Nike's or the ACLU's own political preferences justifies treating consumers with humanitarian or environmental concerns with less solicitude and respect than consumers who count calories or pennies. As the Solicitor General notes, sellers should not be able fraudulently to command the premium prices that consumers will pay for environmentally friendly products any more

than sellers can command premium prices for false statements about quantity or quality. (U.S. Br. at 35-36).

The range of legitimate consumer concerns that may motivate buying is vast. Consumers who are concerned about the testing of products on animals, or about whether a product is organic, or about whether tuna is caught using dolphin-safe nets, or whether goods are made by union labor, would, under Nike's test, be unprotected. Some consumers may choose one brand of lemonade or pasta sauce over another based on the manufacturer's claim that it donates some percentage of the profits from the sale of its foods to charity. Others may care about the fuel efficiency of automobiles because of the expense, while some care because of their concerns about the environment or excessive dependence on foreign oil.

The heart of the distinction that Nike seeks to draw between "moral" or "political" concerns about products and "economic" ones is that all noneconomic concerns about products will be protected by the marketplace of ideas. (Pet. Br. at 34). That is simply not true. The commercial speech doctrine is premised on the Court's longstanding belief that the truth about a company's products and facilities will not emerge if the seller can lie about it. Consumers do not have access to the seller's facility and do not have the time to investigate the truth of the dozens or hundreds of claims they read or hear about products every day. While it is true that when the characteristics of some products become controversial – whether cigarettes cause cancer or SUVs pollute more than autos – it is more likely that the truth of some seller's claims may be tested. But, according to Nike's own admission, its products are made in 900 factories in 51 countries, making it impossible for consumers of Nike products to know what goes on there.

Moreover, there are dozens of companies that manufacture and sell athletic products and thousands that make and sell clothing generally. The fact that Nike's practices have received public attention should not allow it and all other clothing manufacturers blanket immunity from false advertising liability. This Court should not attempt to draw the line between commercial and noncommercial speech according to a subjective, ad hoc and changing assessment of which issues have sufficient political salience as to make consumer protection laws unnecessary.

Not only is Nike's effort to distinguish between commercial and political speech about products based on the preferences of consumers without support in law or logic, it would also be impossible to administer. If an auto manufacturer were to make false assertions in newspapers about the mileage of its SUVs, its speech would be commercial speech as regards consumers concerned only about fuel efficiency for cost reasons, but not as regards consumers concerned about fuel efficiency because of the effect on the environment or on American dependence on foreign oil. Statements to consumers who are allergic to pesticides could be regulated, but the same statement to those who avoid them because of the effect of pesticide spraying on agricultural workers could not. A false statement about whether there was meat within a product would be commercial speech if directed to consumers who avoid eating meat for health reasons, but not if it was directed to those who do so out of concern for the welfare of animals.

Nike argues further that false statements of fact about its factory conditions are constitutionally protected so long as they contain no reference to its specific products. (Pet. Br. at 24). This argument is mistaken because Nike's statements obviously concerned its products, even though

they did not single out any particular one. A cosmetics company that runs a series of advertisements claiming that all of its products are manufactured without animal testing surely is engaging in commercial speech even if it does not mention specific lipsticks or eye makeup that it sells.

Under the California Supreme Court's rule, companies remain free to speak out about the benefits of animal testing, the desirability of using pesticides, or any other issue. They simply cannot make false factual statements about their own practices. Under Nike's approach, Congress and the states would be powerless to prohibit intentionally false advertisements by a company about whether its products are made without use of testing on animals or without use of any pesticides. A restaurant could lie about whether its kitchen is kosher, so long as it did not mention any particular product.

The California Supreme Court decision, in stating that Nike's false factual assertions to consumers about the conditions under which Nike products are made may be actionable, fits squarely within this Court's commercial speech doctrine.

3. Whether speech is commercial speech is not determined by the format. Statements about a product by a manufacturer to prospective consumers are commercial speech even if they are not paid advertisements or on the product label, and do not concern the price, quantity or quality of the product.

If Nike put leaflets under the doors in college students' dorms concerning the price and characteristics of its

sneakers, no one would deny that this was commercial speech, even though it was not a paid advertisement. If Nike had written to college athletic directors and made false assertions that the stitching on its shoes was strong, its statements would indisputably be deemed commercial speech. If it sent letters to assure prospective consumers that its working conditions ensured high-quality products, its statements would be regarded as commercial. The reason is that the statements were to induce customers to buy its products. Nike's statements here are no different. As the Solicitor General argues, if a seller makes false statements about its environmental practices in an op-ed, "there is no reason those statements should be off-limits to a fraud action that otherwise meets the requirements of the common law." (U.S. Br. at 36 n.13).

While claiming that paid advertisements are in some cases political speech (Pet. Br. at 2, citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)), Nike simultaneously seeks to prohibit any state regulation of false statements that are not "in the context of direct product advertising and product labels." (Pet. Br. at 36; *see also* Pet. Br. at 3 (noting that none of Nike's statements appeared in advertising)). Its effort to make First Amendment protection dependent upon the format of the speech has been rejected by this Court. *See, e.g., Central Hudson*, 447 U.S. at 564 (basing the degree of First Amendment protection on whether the communication is misleading and unrelated to illegal activity).

When Nike made factual statements about its practices in letters to college and university athletic directors – an important source of business for an athletic apparel company – unquestionably it intended to encourage them to buy Nike products. When Nike paid for advertisements

in newspapers, it was encouraging consumers to purchase its products.

Thus, the California Supreme Court correctly regarded Nike's speech as commercial. The test for commercial speech used by the California Supreme Court is completely consistent with this Court's decisions as well as with the underlying reasons why commercial speech is treated as a distinct category of expression under the First Amendment. First, commercial speech is by a person or entity, such as Nike, "engaged in commerce." Pet. App. 18a.

Second, the "intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers." *Id.* at 21a. Nike's speech was directed at buyers of its products, including universities and individual consumers.

Third, "the factual content of the message should be commercial in character" in that "it is likely to influence consumers in their commercial decisions." *Id.* at 28a. Kasky's complaint is concerned with the false factual statements made by Nike; not its expression of political opinions. Nike's statements were commercial in that their sole purpose was to increase sales of its products.

4. Treating a manufacturer's factual statements about its products as commercial speech will not result in it receiving less protection than company critics; rather, to accept Nike's position would result in its receiving *greater* protection.

Nike and its *amici* argue that Nike's statements must be treated as noncommercial speech lest Nike critics

receive greater First Amendment protection for their criticism of the company's products than the company receives for its defense of its products. In fact, however, the opposite is true. To accept Nike's position will give it *greater* protection than those criticizing its practices.

If Nike's critics make false statements about it and its products, then Nike can bring a suit for defamation and product defamation. This Court has allowed corporations to sue for defamation to protect their business reputations. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985). Tort law in every state permits corporations to bring actions for defamation and for product disparagement. Restatement (Second) of Torts §561 (1977); *El Meson Espanol v. NYM Corp.*, 521 F.2d 737, 739 (2d Cir. 1975); *Pullman Standard Car Manufacturing Co. v. Local Union No. 2928*, 152 F.2d 493, 495 (7th Cir. 1945). Whether Nike needs to prove actual malice or only negligence will depend on how corporations are characterized – as public or private figures, whether the statements are of public concern, and the scienter required in product disparagement cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 345-46 (describing standards of proof in defamation cases). But Nike undoubtedly may sue its critics who make false statements about Nike and its products.

By contending that its expression is political speech protected by the First Amendment, Nike implies that it cannot be held liable under the First Amendment even if its statements were intentional falsehoods because generally political speech is constitutionally protected so long as it does not constitute a tort such as defamation, false light, or fraud. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (holding that in order to recover for false light

invasion of privacy, plaintiff needed to prove that the defendant published its reports with knowledge of falsity or reckless disregard of the truth). If Nike's speech is regarded as political and as such is protected by the First Amendment despite its falsity, then Nike will have *greater* First Amendment protection than its critics. Nike's speech, unlike its critics', will not be covered by defamation law, and unless the Court creates a new First Amendment category that would allow prohibition of non-defamatory political speech, states would be powerless to regulate.

Further, although Nike argues that the truth about its products will emerge in the marketplace of ideas, Nike's critics are quite likely to be chilled by the threat of product defamation suits. Indeed, anti-sweatshops activists have been the subject of such defamation suits in California. *See, e.g., Fashion 21, Inc. v. The Garment Workers Center,* No. BC269427 (Superior Court, CA, filed March 6, 2002), appeal and petition for writ of mandate pending (Cal.App. Nos. B163114, B159788) (complaint for libel and unfair competition alleging anti-sweatshop activists defamed company by protesting wage and hour law violations in leaflets and at rallies and other organized protest activities). The California Supreme Court's decision thus provides a more level playing field than Nike and its *amicus* the AFL-CIO acknowledge.

At the conclusion of its brief, Nike argues that the "actual malice" standard should be applied in determining whether it can be held liable for false statements concerning the production of its goods. Pet. Br. at 43. As argued below, however, the issue of the scienter required in commercial speech cases is not properly presented in this case because it was not raised in or ruled on by the state courts in this case. In addition, Kasky's complaint alleges

intentional and reckless falsehoods by Nike. Complaint, ¶30. But if this Court were to accept Nike's suggestion to create a new First Amendment category where political speech could be the basis for liability upon proof of actual malice, then Nike's speech likely will be at least as protected as that of its critics, if not more so.

II. FALSE COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

A. False Advertising Is Unprotected Under The First Amendment

This Court has held that "the State may ban commercial expression that is fraudulent or deceptive without further justification." *Edenfeld v. Fane*, 507 U.S. 761, 768 (1993) (citation omitted). Thus, it is firmly established that "[t]he states and the federal government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638 (1985) (citation omitted). For commercial speech to come within First Amendment protection "it ... must ... not be misleading." *Cental Hudson*, 447 U.S. at 566.

Although this Court has recognized the need for some protection for false political expression, *New York Times v. Sullivan,* 376 U.S. 254, 271-72 (1964), it has expressly rejected such protection for false commercial speech. This Court explained in *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977): "[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." Commercial speech is protected so as to provide the consumers with important information; false commercial speech is unprotected because

it does not serve this interest. This Court explained: "[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection – its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 781 (1976).

B. The Issue Of Scienter Is Not Presented By This Case And The Complaint Is Sufficient To Meet Any Scienter Requirement

Nike argues that the California law imposes strict liability for false advertising and that instead "actual malice" is the appropriate standard for liability. Pet. Br. at 43. The issue of scienter, however, is not properly before this Court because it was not ruled on by the California Supreme Court. The California Supreme Court did not hold, as Nike implies, that there is strict liability for false advertising under the California Unfair Competition Law. California Business and Professional Code §§17200-17209. Quite the contrary, the California Supreme Court did not discuss the issue of scienter at all because its decision focused entirely on whether Nike's expression was commercial speech under the United States and California Constitutions. The issue of scienter was not raised by Nike in its brief in the California Supreme Court and hence may not be presented by Nike now.

Since the issue was not raised in or ruled on by the California Supreme Court, it is inappropriate for this Court to rule upon it. This Court has explained that "the appropriate relationship of this Court to the state courts" is a relationship of "peculiar force which should lead [this

Court] to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

This principle applies with particular importance where the issue concerns the interpretation of a state law. As this Court has explained, in the federal system "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statute may be construed in a way which saves their constitutionality." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Thus, the interpretation of California's unfair competition law and false advertising laws, and what scienter requirement is found within them, is a matter that should be left to the California courts in the first instance, and thus should not be ruled on in this case.[3]

Second, ruling on the scienter issue is unnecessary because Kasky's complaint expressly alleges intentional and knowing false statements by Nike. Paragraph 30 of the First Amended Complaint states: "Nike has represented that its products are manufactured in compliance with applicable laws and regulations requiring wages and overtime. The representations are intentionally and/or recklessly misleading and deceptive and/or were negligently

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[3] Similarly, if this Court concludes that Nike's statements are not commercial speech, this Court should not reach the issue of the appropriate standard under the First Amendment for liability of such expression. This is an important issue of first impression – whether non-tortious political speech can be the basis for civil liability – and the question was not ruled upon by the California courts.

made." Indeed, the complaint alleges throughout that Nike intentionally and knowingly made false statements concerning the production of its products. For example, Paragraph 80 of the First Amended Complaint states that "Nike's misrepresentations were made with knowledge or with reckless disregard of the laws of California prohibiting false and misleading statements."

Because the California Supreme Court decided this case on a grant of a demurrer by the California Superior Court, all of the allegations of the complaint must be accepted as true. *See, e.g., Stevenson v. Superior Court,* 16 Cal.4th 880, 885, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (1997) (allegations of complaint are accepted as true in considering a demurrer). Thus, at this stage in the proceedings, any First Amendment requirement for scienter has been met because the Complaint alleges knowing or reckless falsity. If liability is ultimately imposed on Nike on less than its asserted actual malice standard, then after there is a final judgment, Nike could raise that issue on appeal. But at this point the issue is premature because if Kasky proves actual malice at trial – that Nike knew its statements were false or acted with reckless disregard of the truth – then any ruling on whether a lesser standard is sufficient for First Amendment purposes would be unnecessary and an impermissible advisory opinion.

Finally, if this Court reaches the issue of scienter required for false commercial speech, it should hold that in this area liability can be based on intentional, reckless, or negligent false statements of fact intended to sell products to consumers. The government has a crucial interest in ensuring that commercial speech is accurate so that consumers can rely upon it. As this Court stated: "[T]he First Amendment . . . does not prohibit the State from

insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Bd. of Pharmacy v. Va. Consumer Council,* 425 U.S. at 772. As discussed earlier, for precisely these reasons this Court has consistently held that false commercial speech is not protected by the First Amendment at all.

The actual malice standard urged by Nike, Pet. Br. at 43, would impose a very strict standard on government or private plaintiffs bringing actions for false commercial speech. In light of the crucial interest in preventing false commercial speech, a company should be required to exercise due care and thus should be potentially liable if its false statements were uttered intentionally, knowingly, recklessly, or negligently.

C. If Nike's Position Is Accepted, Consumer Protection And False Advertising Laws Nationwide Will Be In Jeopardy

Nike's position, if accepted by this Court, will put in jeopardy a vast array of federal, state, and local laws designed to protect consumers. For example, under the position taken by Nike and its *amici*, a company could not be sued for false advertising if it falsely posted "Going Out of Business Sale" signs to attract customers. Nike would view the sign as non-commercial speech because it is not about a specific product and is not about its essential characteristics. Yet, such false advertising clearly would run afoul of Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Nike's position would make many, if not most, applications of this statute unconstitutional.

Indeed, Nike's position would make countless state and federal consumer protection laws unconstitutional. For example, California law prohibits false or misleading statements about whether products were made by blind workers (Cal. Bus. & Prof. Code, §17522 (2003)), American Indians (Cal. Bus. & Prof. Code, §17569 (2003)), or union labor (Cal. Labor Code, §1012 (2003)). Under the position taken by Nike and its *amici*, all of these laws would be unconstitutional because such claims, by their view, do not constitute commercial speech. Likewise, by Nike's argument, state laws designed to provide accurate information to consumers about environmental claims in advertisements are also unconstitutional. California, for example, enacted a statute providing: "It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claims, whether explicit or implied." Cal. Bus. & Prof. Code, §17850.5(2). But Nike and its *amici* would deny the government the power to ensure accurate statements by companies concerning the consequences of their actions for the environment.

Federal law makes it unlawful to disseminate false advertising by mail or other means that directly or indirectly induces consumers to purchase food, drugs, services, or cosmetics. 15 U.S.C. §52 (2003). Nike's position would make it unconstitutional to apply this law to false statements by companies concerning whether their food was organic or whether its drugs and cosmetics were tested in a "cruelty free" manner. Laws ensuring accurate food labels would become similarly vulnerable.

The list of laws endangered by Nike's position is endless. Countless consumer protection laws seek to provide prospective customers with accurate information about products. But Nike's approach would place many

claims beyond the reach of government regulation and, in fact, would immunize the speakers from liability.

III. ACCORDING TO NIKE AND ITS *AMICI*, KASKY HAS SUFFERED NO INJURY IN FACT AND THUS THIS COURT MUST DISMISS THE WRIT AS IMPROVIDENTLY GRANTED AS THERE IS NO ARTICLE III CASE OR CONTROVERSY

From the outset, Nike's brief stresses that Kasky has suffered no injury from Nike's false speech. Nike, for example, points out that Kasky "alleges no harm or damages whatsoever regarding himself." Pet. Br. at 5 (quoting First Amended Complaint §8). Nike repeatedly emphasizes that "Kasky . . . alleges no injury," Pet. Br. at 45, and that it is a suit by a "person who concedes that he was entirely unaffected by those statements." Pet. Br. at 47.

This Court, of course, has repeatedly held that no federal court may hear a case unless the plaintiff has personally suffered an injury because "injury in fact" is the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). This Court has explained that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983) (citation omitted). Because "injury in fact" is mandated by Article III, it is a prerequisite to jurisdiction in this Court, as much as in the lower federal courts.

This Court has held that it may hear cases in which the plaintiff does not meet Article III's standing requirement if a state court judgment imposes harms on the defendant. In *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623 (1989), this Court explained: "When a state court has issued a judgment in a case where the plaintiffs in the original [state court] action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties [defendants in the state court action] who petition for our review, where the requisites of a case or controversy are also met."

ASARCO applies when a state court "has issued a judgment." There is no judgment in this case because the California Supreme Court was considering whether the trial court properly granted Nike's demurrer. Nor has the state court caused "direct, specific, and concrete injury." As discussed above, Nike's claims that its speech has been chilled has no support in the record of this case. Moreover, this Court has stated that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

In *ASARCO*, if this Court had denied review, the petitioners would have had "to commence a new action in federal court to vindicate their rights under federal law," an action which would have been "at the cost of much disrespect to state-court proceedings and judgments." 490 U.S. at 623. In contrast, Nike can seek review in this Court if a judgment is entered against it and upheld in the California appellate courts.

Because, as Nike repeatedly argues, Kasky has suffered no injury cognizable under Article III, this Court lacks jurisdiction and should dismiss the writ as having been improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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